Service of the within and receipt of a copy thereof is hereby admitted this ..... day of January, A.D. 1976.

MOTION FILED

JAN 30 1976

IN THE

Supreme Court of the United States

October Term 1975
No. 74-1560

UNITED STATES OF AMERICA,

Petitioner,

vs.

AMADO MARTINEZ-FUERTE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion to File Brief of Amicus Curiae and Brief of Amicus Curiae.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion for Leave to File Brief as Amicus Curiae.

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the Los Angeles County Bar Association hereby moves this honorable Court to grant leave to file the accompanying Brief of an Amicus Curiae. This Motion for Leave of Court is necessary because this moving party has not obtained consent for the filing of said brief as contemplated by the said Rule of this Court. Pursuant to leave of the Ninth Circuit Court of Appeals, the Los Angeles County Bar Association filed its Amicus Curiae Brief with that Court.

1. *Interest of the Appellant.* The present petition involves the United States District Court's refusal to exclude evidence obtained under the color of a general "Warrant of Inspection." Said "Warrant of Inspection"

was an apparent attempt to avoid the recent decisions of the United States Supreme Court and United States Circuit Court of Appeals for the Ninth Circuit, which consistently have held that searches in the absence of probable cause or founded suspicion are not constitutionally permissible.

The Los Angeles County Bar Association is vitally interested in the fair administration of justice. In the present action, the evidence establishes that in excess of 145,960 persons, (99.9% who were apparently either U.S. citizens or legal resident aliens), were slowed or detained, briefly or otherwise, from 4 P.M. on June 22, 1974, to 4 P.M. on June 30, 1974, as they proceeded northbound on Interstate 5 at the San Clemente checkpoint pursuant to a "Warrant of Inspection" issued on June 22, 1974, by U.S. Magistrate Edward Infante. Interstate 5 is the most heavily travelled artery between San Diego and Los Angeles, and the overwhelming majority of persons regularly interfered with are residents of Los Angeles County. As a result of the "Warrant of Inspection" the rights of many residing in or travelling to the Los Angeles area were adversely affected. Believing that attorneys individually and Bar Associations generally have an obligation to uphold constitutional principles and owe fidelity to public duty, and that a substantial interest of those it serves will be positively benefited, the Los Angeles County Bar Association seeks to uphold this obligation through its appearance in this case as Amicus Curiae.

2. *Need for an Amicus Brief.* In the present appeal the Federal Public Defender, on behalf of the Respondent, presents very learned and compelling arguments attacking the concept of general area search warrants.

The Government in support of the concept has adopted a novel and alarming theory equating need with probable cause. The Los Angeles County Bar Association wishes in its Brief to demonstrate more clearly that even if such a concept existed, which it does not, the Government failed to demonstrate such a need. The Court of Appeals for the Ninth Circuit, upon motion, granted leave to the Los Angeles County Bar Association to file its Brief and argument below. It is believed that the statistical perspective not fully presented by the other parties herein was instrumental to the favorable decision of the Ninth Circuit, as it would be for this Court.

3. *Late Application.* The Brief of the Petitioner United States was received by the offices of the Los Angeles County Bar Association on or about December 9, 1975. Since the Association is a voluntary bar association it has no staff attorneys, but only designated voluntary private counsel for specific cases of public interest. Inasmuch as the undersigned is the counsel in the present case, and was out of the United States from December 9, 1975, until January 6, 1976, the Amicus Curiae Brief could not be filed at the time of filing of the Brief for Respondent on or about December 31, 1975, as required by Rule 42(2).

Because of the importance of the case, it is respectfully submitted that this Court receive guidance and assistance from sources beyond the summary decision of the District Court and the briefs submitted on behalf of the parties to the appeal. The instant Amicus Brief is aimed at providing such assistance.

Wherefore, the Los Angeles County Bar Association respectfully requests leave to file the accompanying Amicus Curiae Brief.

Dated: January 29, 1976.

Respectfully submitted,

LOS ANGELES COUNTY BAR ASSOCIATION,

By ROBERT L. MILLER,

Attorney for Amicus Curiae.

Affidavit of Robert L. Miller in Support of Motion for Leave to File Brief as Amicus Curiae.

State of California, County of Los Angeles—ss.

Robert L. Miller, being first duly sworn, deposes and says:

1. I have been authorized by the Board of Trustees of the Los Angeles County Bar Association to prepare and file this Amicus Curiae Brief on its behalf in the instant case. I am Chairman of its Immigration Committee.

2. I have read the contents of the Motion for Leave to File Brief as Amicus Curiae. I hereby verify, to the best of my knowledge, information and belief, that the information stated in the motion is true and correct. Sworn and Subscribed to before me this 29th day of January, 1976.

ROBERT L. MILLER,
LOS ANGELES COUNTY BAR ASSOCIATION,
Attorney for Amicus Curiae.

IN THE

Supreme Court of the United States

October Term 1975
No. 74-1560

UNITED STATES OF AMERICA,

Petitioner,

vs.

AMADO MARTINEZ-FUERTE, *et al.*,

Respondents.

Brief of Amicus Curiae Los Angeles County Bar Association.

I.
STATEMENT OF QUESTIONS PRESENTED.

Did the trial court err by denying the respondent's motion to suppress the evidence derived from the cause-less stop and detention of defendant's vehicle at the San Clemente, California checkpoint in holding it legal under the inspection warrant issued by a United States Magistrate?

II.
STATEMENT OF THE CASE.

A. Nature of the Case.

This Petition arises from the criminal conviction of the Defendant-Respondent, Amado Martinez-Fuerte (denominated herein defendant), following a jury trial in the United States District Court for the Southern District of California, Honorable Howard B. Turrentine, Judge Presiding, which was reversed by the Court of Appeals for the Ninth Circuit (514 F.2d 308).

B. Statement of Proceedings.

On July 2, 1974, the defendant was charged in a five count indictment with inducing the entry of and the transportation of two illegal aliens and conspiracy to commit those offenses. 8 U.S.C. § 1324(a)(2) and (4).

In a pre-trial proceeding, the defendant through his attorney moved for the suppression of evidence obtained as a result of the stop of the defendant by Border Patrol Officers at San Clemente basing the motion on lack of probable cause, founded suspicion or a valid warrant. The government stipulated in connection with this motion that the stop of the defendant at the checkpoint was based entirely upon the inspection warrant issued by the United States Magistrate. Following a hearing in chambers, the Court denied the defendant's motion without opinion (A. 28).

The case proceeded to jury trial on July 10, 1974, and resulted in a finding of guilty on the two counts charging the defendant with illegal transportation of aliens.

On July 11, 1974, the defendant was sentenced to a term of three years on both counts to run concurrently, suspended on condition that defendant spend six months in a jail-type institution (A. 42). On July 11, 1974, a Notice of Appeal was filed. On March 5, 1975, the Court of Appeals for the Ninth Circuit reversed the conviction (514 F.2d 308), (Pet. App. 1a-43a). Representing the defendant then and now is Charles M. Sevilla, Chief Trial Attorney, Federal Defenders of San Diego, Inc.

III.
STATEMENT OF FACTS.

On June 22, 1974, a "Warrant of Inspection" (A. 52-53) was issued by Magistrate Edward A. Infante of the United States District Court, Southern District of California, based on affidavits submitted by the United States Border Patrol (A. 45-51). The warrant authorized the operation of a Border Patrol checkpoint for a period of ten days on the northbound lanes of Interstate Route 5 about five miles south of San Clemente and 68 miles north of the Mexican Border, approximately half-way between San Diego and Los Angeles, California.

The warrant was based on the magistrate's finding that "mass violations of the Immigration laws of the United States" were occurring at the checkpoint. It authorized Border Patrol officers to "stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of such vehicle," and "to conduct a routine inspection of said vehicles for the presence of aliens." (A. 52-53).

The defendant's car was stopped at the checkpoint on the afternoon of June 24, 1974, pursuant to the warrant. His car was directed to a secondary position off the highway where the defendant and his two female passengers were interrogated about their right to be in the United States. After the passengers admitted being illegally in the country the defendant was arrested.

At trial the two passengers, by this time material witnesses, testified that they had paid an unidentified man in Tijuana $200 to take them to Los Angeles. After obtaining false cards from him, they successfully

crossed the border and at San Ysidro, California, met the same unidentified man who provided them with bus tickets to San Diego. One of the witnesses testified that the defendant was with the man at San Ysidro. Later the unidentified man met them at the San Diego bus station and took them to the defendant's waiting car. The defendant then drove them north until they were stopped at the checkpoint.

IV.
ARGUMENT.

A. Under the Controlling Precedents in the Ninth Circuit, the San Clemente Border Patrol Checkpoint Is Operating in Clear Violation of the Fourth Amendment to the Constitution.

During recent months, this Court and the Ninth Circuit have repeatedly held that the traditional warrantless operation of such inland Border Patrol checkpoints as the one near San Clemente is an unconstitutional infringement on the Fourth Amendment's search and seizure safeguards,[1] and particularly that it is not located at a "functional equivalent" of the border as required for warrantless searches without probable cause by *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973). Rather, to stop a vehicle at such a checkpoint the Border Patrol must have "founded suspicion", and to search a vehicle there it must have probable cause under the holding of *United States v. Brignoni-Ponce,* and *United States v. Ortiz, supra.*

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[1]See, for instance, *United States v. Brignoni-Ponce,* No. 74-114, 422 U.S. ..... (1975); *United States v. Ortiz,* No. 73-2050, 422 U.S. ..... (1975); *United States v. Bowen,* 500 F.2d 960 (9th Cir. en banc, May 9, 1974), reversed on other grounds, 95 S.Ct. 2569 (1975).

In this case the Government contends that the operation of the San Clemente checkpoint on the day of defendant's arrest was lawful because of the existence of a "Warrant of Inspection" allowing the Patrol to stop all northbound vehicles on Interstate 5.

The warrant adds nothing to the legality of the Government's position. This point has been exhaustively briefed in the Brief for Respondent, which is herein incorporated by reference. It is mentioned here only for purposes of emphasis.

B. The Operation of the San Clemente Checkpoint at the Time of Defendant's Arrest Was Improperly Authorized by a General Area-Type Warrant Issued Not Only in Violation of the Fourth Amendment but Also in Violation of the Standards Suggested in the Almeida-Sanchez Dicta Relied Upon by the Government.

In its brief opposing the motion for the suppression of evidence obtained at San Clemente, the Government relied heavily on dicta in Justice Powell's concurring opinion in *Almeida-Sanchez,* (413 U.S. 266, 275-284 [1973]). However, the standards set forth by Justice Powell, even if acceptable to a potential majority of the Supreme Court, were clearly unmet in the instant "Warrant of Inspection". Moreover, such a warrant has inherent Constitutional infirmities.

As noted by the defendant in his brief, our Constitutional and common law history is replete with instances in which non-specific search warrants were invalidated as violations of the Fourth Amendment's requirement that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and

the persons or things to be seized. For discussion of the particularity requirement, see, for instance, *Carroll v. United States,* 267 U.S. 132 (1925), and *Boyd v. United States,* 116 U.S. 616 (1886).

In *Carroll,* the Supreme Court dealt with and rejected the argument that a compelling need of the government, (in that instance, for law enforcement tools to control the rampant violation of prohibition laws in the 1920's), justified a curtailment of traditional constitutional safeguards, an argument not unlike those the Government is now making in pointing to a serious general problem, *i.e.,* the silent invasion of illegal aliens from Mexico described in *United States v. Baca,* 368 F.Supp. 398 (U.S.D.C. So. District of California, 1973) and urging that the need for the traffic checkpoint to deal with this problem equates with probable cause.

In disposing of this sort of "ends-justify-the-means" rationale for infringements of Fourth Amendment rights, the majority in *Almeida-Sanchez, supra* at 273, pointed out that:

> "it is not enough to argue, as does the government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."

Continuing, Justice Stewart wrote:

> "The court that decided *Carroll v. United States,* ante, sat during a period in our history when the nation was confronted with a law enforcement

problem of no small magnitude—the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment. Chief Justice Taft's opinion for the court *distinguished between searches at the border and in the interior, and clearly controls the case at bar:* (emphasis added)

> " '*It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and the indignity of such a search.* Travellers may be stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and has belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use public highways, *have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.*' " (*Almeida-Sanchez, supra* at 274, emphasis added.)

Justice Stewart conceded that *Carroll* and its progeny authorized searches of automobiles without warrants due to their unique mobility, but he emphatically reiterated that probable cause is a prerequisite for a lawful search of a motor vehicle:

> "*Carroll* has been followed in a line of subsequent cases, but the *Carroll* doctrine does not declare a field day for the police in searching automobiles.

> Automobile or no automobile, there must be probable cause for the search." (*Almeida-Sanchez, supra* at 269).

The traditional view of probable cause notwithstanding, the Government's reliance on Justice Powell's concurring opinion in *Almeida-Sanchez* and his discussion of a functional equivalent of probable cause as a basis for its "Warrant of Inspection" in the instant case appears to be badly misplaced.

For even if we assume that Justice Powell could muster a majority supporting his criteria for the issuance of "area warrants," the support for the warrant of inspection in the instant case fails to satisfy the requirements set forth by Justice Powell.

Justice Powell suggested four criteria to be used in determining whether an "area warrant" should be issued: (1) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (2) the proximity of the site to the border; (3) the extensiveness and geographic characteristics of the area, including the roads, and their use; and (4) the "probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area." *Almeida-Sanchez, supra* at 283, 284.

Even under these standards, the warrant issued in the instant case must fail.

First, the warrant fails to meet Justice Powell's standards in terms of proximity to the border and character of the area. Justice Powell's discussion makes

it clear he envisioned using such area warrants for surveillance along the border, in areas where many aliens are surreptitiously entering the United States by travelling overland. He makes reference to "tracks" (*i.e.* trails) and uninhabited desert areas, (*Almeida-Sanchez, supra* at 284. footnote 4). By no contrivance can it be argued that a point 68 miles north of the Mexican border on a major freeway between two large American metropolitan centers, a road used lawfully by some ten million motorists annually, (based on annualizing the figures supplied by Mr. Robert McCord of the Border Patrol in his affidavit seeking the "Warrant of Inspection" (A. 45-49)), is the kind of place Justice Powell considered suitable for an area warrant permitting the Border Patrol to stop all vehicles.

The Immigration Service appears to agree that an area warrant should be restricted to an area near the border. Charles Gordon, general counsel for the Immigration and Naturalization Service testified before the House Subcommittee on Immigration, Citizenship and International Law on July 26, 1973, and summarized his analysis of the *Almeida-Sanchez* decision by saying:

> "So in my opinion the majority of the court would uphold a search without a warrant based on probable cause and moreover even if it is necessary to get a warrant, the majority of the court has endorsed this concept of an area search warrant *in an area where there is strong suspicion that aliens are being smuggled in, like a back road near the border.*" (Quoted in 51 *Interpreter Releases* at 32, emphasis added).

Second, the instant case utterly fails to meet the fourth relevant factor suggested by Justice Powell. Using the data provided on July 1, 1974, by Mr. Gene Harris of the Border Patrol pursuant to the warrant's report-back requirements, (A. 53, 54), it is clear that the concentration of allegedly illegal aliens among the total population of highway users at San Clemente is minuscule.

The Border Patrol's data [Ex. A in Mr. Harris' statement] shows that of 145,960 vehicles passing through the checkpoint during the 124 hour period of operation, only 171 were found to contain "deportable aliens", or 0.12 percent of all vehicles passing through the checkpoint. In other words, the warrant authorized an infringement on the constitutional rights of nearly 99.9 per cent of the motorists who were travelling lawfully through the checkpoint in order to catch about the one tenth of one per cent who were alleged to be deportable aliens.

If that kind of conduct is NOT precisely the sort of "field day for the police in searching automobiles" castigated by the majority in *Almeida-Sanchez, supra* at 269, it is difficult to imagine what sort of conduct would now constitute a "field day."

The overwhelming majority of persons travelling north on Interstate 5 during this period were subjected to the annoyance of this police action without any basis whatever other than the fact that they chose to exercise their well-established right to travel between two major cities via the main highway artery linking the two.

In summary, the use of general or area search warrants raises constitutional problems of the most

serious nature. But even if such a warrant could be justified in a remote desert area near the border where numerous aliens are surreptitiously entering the United States and few other persons are likely to be found, it is an intolerable infringement of the Constitutional rights of millions of persons to issue such a warrant for searches on a highway where lawful motorists outnumber vehicles transporting allegedly illegal aliens by a ratio of one thousand to one.

The Government's brief repeatedly suggests that an area warrant is *more* justified along Interstate 5 near San Clemente than in the remote area where the *Almeida-Sanchez* fact situation arose. However, all logic suggests that, using Justice Powell's guidelines as he illustrated them, such a general warrant would be infinitely *less* appropriate on the major artery between two American metropolitan centers where the proportion of vehicles containing suspected illegal aliens is a fraction of one per cent.

C. An Analysis of the Data Submitted by the Government to Justify the "Warrant of Inspection" Clearly Demonstrates That the San Clemente Checkpoint Is an Inefficient and Constitutionally Unreasonable Tool of Law Enforcement, One That Intrudes Upon the Fourth Amendment's Guarantees to Millions of Persons Annually Without Significantly Aiding the Government in Achieving Its Legitimate Goal of Excluding Illegal Aliens.

"The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added) *Fourth Amendment, United States Constitution.*

The word "unreasonable" as used in the *Fourth Amendment* to the *United States Constitution* can have no meaning without a thorough analysis of all of the facts and circumstances involved in the search and seizure in question. The following is an analysis of the statistics as provided by the Government, which, on their face, show patent unreasonableness.

Using only the statistics provided by the Border Patrol in its effort to justify the operation of the San Clemente checkpoint, it is apparent that the checkpoint is an incredibly ineffective tool of immigration law enforcement and a constitutionally unreasonable use of the Border Patrol's limited resources.

According to the Affidavit in support of the June 22, 1974, warrant, the Border Patrol apprehended a total of 16,893 allegedly illegal aliens during calendar year 1973 at the San Clemente checkpoint. For comparison, the *1973 Annual Report of the Immigration and Naturalization Service,* cited at 51 *Interpreter Releases* 94, indicates that the Immigration and Naturalization Service apprehended a total of 655,968 suspected illegal aliens in the United States last year, 88 per cent or 576,823 of them Mexican nationals.

In Mr. McCord's affidavit (A. 45-49), the Border Patrol indicates that some 40,000 suspected illegal aliens a month are estimated entering the United States through the Chula Vista sector of responsibility alone, an annual total of about 480,000. Of these, the affidavit indicates 95 per cent are bound for jobs in Los Angeles

or in the San Joaquin Valley; approximately 70 per cent of all suspected illegal aliens "traverse" Interstate Highway 5.

Again applying these Government figures to the question of the San Clemente checkpoint's reasonable practical value, the results are alarming. If 480,000 suspected aliens enter California alone each year, and 95 per cent of them are destined for jobs in Los Angeles or points north, that means some 456,000 suspected aliens are headed north from San Diego or Imperial Counties. It means that 70% of them, or 319,000 illegal aliens will "traverse" Interstate 5 each year.

If, as the Government contends, the San Clemente checkpoint is the Government's cornerstone of the checkpoint system which acts as a secondary line of defense against the penetration of illegal aliens into the interior of the United States (Brief for Pet. 49), the Government's own data indicates a frighteningly poor success rate. If less than 17,000 allegedly illegal aliens were apprehended in 1973 at San Clemente, out of the estimated 319,000 who travelled north by that route, 95 per cent escaped detection at San Clemente.

An explanation for the failure of the San Clemente checkpoint to detect and apprehend a greater number of illegal aliens en route north is also offered in Mr. McCord's affidavit, which states (on pp. 4-5 thereof):

> 14. We are unable to maintain the checkpoint in operation continuously because of safety factors that deteriorate because of inclement weather and traffic in excess of 2,500 cars per hour. We are

also unable to maintain the checkpoint because of limitations in manpower available for assignment as well as the basic allocation to that function. The checkpoint is in operation approximately 60% of the time during the year.

15. Smugglers of aliens and those aliens travelling with prior knowledge of the checkpoint customarily wait for the checkpoint to become inactive, for any of the above reasons, before attempting to continue up the highway. This again demonstrates the deterrent effect which the checkpoints have on the traffic in illegal aliens.

Contrary to Mr. McCord's conclusion just cited, the fact that the checkpoint is shut down nearly half the time, particularly during peak traffic periods when other law enforcement officers are least likely to notice carloads of aliens, may explain why the San Clemente checkpoint is not an effective deterrent to the movement of allegedly illegal aliens northward.

Nevertheless, while the checkpoint only reduces the flow of illegal aliens to the north by about 5%, it permits the Border Patrol to stop and cursorily examine thousands of cars driven by millions of law-abiding citizens and legal resident aliens each year without any pretext of probable cause or even founded suspicion. These conclusions are disturbing, yet they are clearly supported by the Border Patrol's own data, data intended to justify the operation of the San Clemente checkpoint.

Another aspect of the government's data is a strong suggestion that, while the Border Patrol is under close judicial scrutiny, it is either modifying its enforcement practices or modifying its reporting of the data.

On page two of Mr. McCord's affidavit of June 22, 1974, in support of the "Warrant of Inspection", he states:

> "At the traffic checkpoint located south of San Clemente, California, we stop approximately 50 vehicles during each hour of operation for limited inspection consisting of inquiring of the occupants of the vehicle as to their citizenship status. The average car is detained for questioning of the occupants approximately three to five minutes."

However, the July 1, 1974, affidavit of Mr. Gene Harris, who is Patrol Agent in Charge at the San Clemente checkpoint, presents another picture [Ex. A, A. 54 *et seq.*]. Exhibit A shows that, during the first eight days of the June 22, warrant of inspection, 145,960 cars passed through the checkpoint, but only 820 were stopped for questioning during that entire period (124 hours and ten minutes of operating time). If Mr. McCord's figures are correct, and his figure of an average 1,200 cars passing through the checkpoint per hour closely correlates with the total of 146,000 cars in 124 hours, the patrol should have been expected to detain more than 6,000 cars for questioning (50 times 124 hours), not the mere 800 reported.

In any event, the overall conclusion that must be drawn from a review of the data provided by the Government itself on the operation of the San Clemente checkpoint is that it is an unreasonable infringement on the liberty of thousand of persons engaged in legitimate activities, with *de minimus* effectiveness towards its declared purpose.

V.
CONCLUSION.

For the foregoing reasons the Los Angeles County Bar Association as Amicus Curiae respectfully submits that the trial court erred in denying the defendant's motion for suppression of evidence and in upholding Magistrate Infante's warrant of inspection, and that the judgment of the Court of Appeals for the Ninth Circuit was correct.

Respectfully submitted,

LOS ANGELES COUNTY BAR ASSOCIATION,
By ROBERT L. MILLER,
Attorneys for Amicus Curiae.